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CURRENT TOPICS

Corporal Punishment

IT may be the first step which counts but those which follow are usually equally important. At the Conservative Party Conference last week Mr. BUTLER made it unlikely that the death penalty and flogging will ever be restored to a more important place in our penal system than they have now. His declaration that he did not propose to put the clock back 100 years is the finishing touch to the process of legal reform which has been going on for longer even than a century. Unhappily, however, although we have almost entirely abandoned hanging and flogging, we have a very long way to go before the most optimistic observer could describe our penal system in terms of bricks and mortar as up to date. It is undoubtedly depressing to contemplate spending our hard-earned taxes on building prisons, but we agree with the Home Secretary that new buildings are necessary. Equally, we are pleased that a new research department is being established at Cambridge, since there is obviously a great deal that we do not know about the causes of crime, but we are not optimistic about the prospect of quick results. Some of the world's greatest brains have spent time brooding over crime and it is unlikely that the new department will have the solution suddenly revealed to it. Even on the basis of our existing knowledge there is enough to occupy us for several years. It is true that there are some men and fewer women who embark on a career of crime and regard prison sentences as an occupational risk. It will take many years and much effort to find an effective way of dealing with them, but there are also many men and women who may have gone too far to be dealt with by the probation service but who might be rescued by improved prisons.

Preparation for Release

BY way of an example of the direction which reforms and improvements can take, we may mention a book called "Teach Them to Live" by Miss FRANCES BANKS (Max Parrish, 30s.) which is a study of the growth of education in prisons. It is generally accepted that one of the dangers of prison life is boredom and the demoralisation which goes with it. For many years past a gallant band of pioneers has been working with success to educate prisoners during their enforced leisure: much more could be done with greater resources. Likewise, there is great scope, given greater resources, for increasing the amount of work available for prisoners to do and thus to pay for their keep, help to support their families and possibly to strengthen the idea of the retributive element in punishment by paying compensation to innocent persons who have suffered as a result of crime.

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Thus, although Mr. BUTLER'S speech last week was a landmark in penal reform, the real work is just beginning. We hope that now there may be an end to controversy about the methods and purpose of punishment and that all who are concerned with the heavy incidence of crime and the appalling waste that goes with it will now devote their energies to supporting the Government in the measures which they are contemplating. These are of particular importance in dealing with juvenile offenders.

The Wolfenden Report

IT seems clear that at last there will be a debate on the Wolfenden Report in the new Session of Parliament. We can sympathise with any government which prefers to stay out of trouble by declining to get itself involved in legislating on prostitution, homosexuality and, incidentally, gambling. All three have been with us since the beginning of history and probably earlier and so far no legislative attempts to deal with them in any country have had any lasting or profound success. Just as we do not expect the new department of criminology to produce any quick and startling conclusions, so it would be absurd to suggest that legislation can deal effectively once and for all with other human habits. Yet we have enough information to take some steps forward.

Amendments to County Court Fees

THE County Court Fees (Amendment) Order, 1958 (S.I.1958 No. 1650 (L.10)), came into force on 13th October. Among its principal purposes is to prescribe the fees payable on (i) an application under the Landlord and Tenant (Temporary Provisions) Act, 1958—for which the fee will be 10s., as on an application under the Rent Act, 1957; (ii) an application for taxation of a solicitor's bill of costs under the Solicitors Act, 1957—the fee here will be 1s. for every £2 allowed, with a minimum fee of 5s.; and (iii) an application for substituted service of a document other than a summons in an action, e.g., a judgment summons—the fee being fixed at 5s. under both limbs of Fee 7.

Validity of Marriage

WOLVERHAMPTON magistrates were recently asked for their opinion as to the validity of a marriage between two persons under twenty-one who had been through a form of marriage without obtaining the consents required by s. 3 of the Marriage Act, 1949. It appeared that they had informed the registrar that they were both twenty-two and the birth certificates which they produced had been altered to confirm this statement. The magistrates and the local registrar advised them that their marriage was valid and there can be no doubt that this view (the magistrates were not required to decide the point) is in accord with authority. In *Re Field's Marriage Annulling Bill* (1848), 2 H.L. Cas. 48, a marriage was upheld where a husband had made a false statement as to his wife's age in the publication of the banns and in the register of marriage, and in *R.* v. *Inhabitants of Birmingham* (1828), 8 B. & C. 29, where a marriage was solemnised by licence between a man and a woman, the former being a minor whose father was living but had not consented to the marriage, it was held that the marriage was valid. More recently, the Court of Appeal, following *Re Rutter* [1907] 2 Ch. 592, applied a similar reasoning in *Plummer* v. *Plummer* [1917] P. 163, and it is not without significance that such marriages are not rendered void by s. 49 of the Act of 1949. However, criminal proceedings may follow the making of a false declaration.

REVOCABLE AND DISCRETIONARY TRUSTS

THE Special Commissioners of Income Tax have recently sent out a four-page circular to sur-tax payers inviting their attention to ss. 21 and 22 of the Finance Act, 1958, which make important changes in the tax law relating to settlements. The circular also draws attention to certain time limits laid down in s. 21 (4) and s. 22 (5) of the Act within which, in certain cases, action may be taken to remove settlements from the scope of the new provisions; and to a statement made by the Solicitor-General in the House of Commons on 15th July, 1958, as to the circumstances in which the Commissioners of Inland Revenue will be prepared to use their discretion to extend these time limits. Otherwise the circular sets out in full ss. 21 and 22 of the Act of 1958, and ss. 404, 405, 407 (1) and 408 (1) and (2) of the Income Tax Act, 1952, without comment. The purpose of this article is to explain generally the effect of the new legislation.

Revocable settlements

By s. 411 (2) of the Income Tax Act, 1952, a "settlement" includes any disposition, trust, covenant, agreement or arrangement. Section 404 of the Act is divided into two parts, subs. (1) applying to settlements having the form of covenants to make annual payments, while subs. (2) is concerned with capital settlements. It will be convenient to refer to subs. (2) first. It provides that if and so long as the terms of any settlement are such that: (*a*) any person has or may have power to revoke or otherwise determine the settlement or any provision thereof; and (*b*) if the power is exercised the settlor or the wife or husband of the settlor will or may become beneficially entitled to the whole or any part of the property then comprised in the settlement or of the income arising from the whole or any part of the property so comprised, then, whether or not the power is exercised, the income (or the appropriate part of it) arising from the settlement in any year of assessment is to be treated for tax purposes as the income of the settlor.

If the power of revocation or determination is exercisable within six years of the time when the particular property first becomes comprised in the settlement the subsection applies immediately; but if the power is not exercisable within that time, it applies only as from the date on which the power becomes exercisable. The power must, however, be found in the terms of the settlement, and must not arise from some circumstance independent of it (*Inland Revenue Commissioners* v. *Wolfson* (1949), 31 Tax Cas. 141).

Two House of Lords decisions

In 1957 two important decisions were given in the House of Lords on the construction of s. 38 (2) of the Finance Act, 1938 (now repealed), from which s. 404 (2) of the Income Tax Act, 1952, is derived. In *Countess of Kenmare* v. *Inland Revenue Commissioners* [1958] A.C. 267 the trustees of a

fund of some £700,000 were empowered to transfer to the settlor, who was fifty years of age at the time of making the settlement, amounts of the trust fund not exceeding £60,000 in any period of three years, so that when she was between eighty and ninety years old the whole of the trust fund would be received by her. The House held there was power to determine the settlement. Lord Reid said that although there must be a real possibility of there being power to release the whole of the fund before the death of the settlor, that did not mean there must be a probability in the sense that the event was more likely to happen than not.

In *Inland Revenue Commissioners* v. *Saunders* [1958] A.C. 285 the trustees of a settlement were empowered to apply any part of the capital of trust funds amounting to £25,100 for the benefit of a specified class including the settlor's wife, with a limitation that the capital of the trust should not be reduced below £100. It was held that the settlor was not chargeable to sur-tax in respect of the income of the settlement because a power to dispose of nearly the whole of the capital, subject to the limitation, was not a power to bring the settlement or any provision of it to an end. A partial revocation did not constitute a "revocation," nor did a partial determination constitute a "determination." All that would happen by the partial withdrawal of the trust funds would be to diminish the benefit enjoyed by the beneficiaries under the trust.

Section 21

It is the decision in *Saunders'* case which has provoked s. 21 of the Finance Act, 1958, the purpose of which is to nullify the effect of that decision. Subsection (2) provides that in s. 404 (2) of the Income Tax Act, 1952, references to a power to revoke or otherwise determine a settlement or any provision thereof shall be deemed to include references to: (*a*) any power to diminish the property comprised in the settlement; and (*b*) any power to diminish the amount of any payments which are or may be payable under the settlement to any person other than the settlor and the wife or husband of the settlor.

Paragraph (*b*) refers to the kind of settlement where the settlor or his wife is entitled to the balance of the settlement income after a portion of it has been paid to other persons. Thus, if the settlement provides that three-fourths of the income is to be paid to *A*, and the balance to the settlor's wife, but there is power for the trustees to decrease the amount of income payable to *A*, then the increased amount of income available to the settlor's wife will be treated as the settlor's income in addition to the one-fourth which the wife is entitled to in any event.

Deeds of covenant

Deeds of covenant are affected by s. 404 of the Income Tax Act, 1952, in much the same way as capital settlements. Subsection (1) provides that if and so long as: (*a*) any person has power under the "settlement" to revoke or otherwise determine it or any provision of it, and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments under the settlement; or (*b*) the settlor or the wife or husband of the settlor may cease, on the payment of a penalty, to be liable to make any annual payments under the settlement, then any sums payable by the settlor or the wife or husband of the settlor in consequence of that provision of the settlement are to be treated as income of the settlor for tax purposes.

The subsection contemplates both the making of annual payments by the settlor to the beneficiary direct, and the making of annual payments by the settlor to trustees who will make payments to the beneficiary. Section 21 (1) of the Finance Act, 1958, provides, in effect, that the same result is to occur under s. 404 (1) of the Act of 1952 if there is power to diminish either the amount of the payments to be made to the beneficiary or the amount of the annual payments which the settlor or the wife or husband of the settlor have to make. Section 21 (1) also covers cases where the amount of the annual payment can be diminished in consideration of the payment of a penalty. But the settlement is only caught to the extent of the power to diminish any payments under the settlement. Hence, if there is a power to reduce a settlor's obligation to make annual payments from £100 to £80 a year, £20 is caught by the new legislation and will form part of the settlor's taxable income, even though he, in fact, pays away the full £100 each year.

In the case of an income settlement made before 16th April, 1958, s. 21 will not apply if the settlement was entered into in connection with a judicial separation, or with a separation agreement or with the dissolution or annulment of a marriage. Otherwise (subject to what is said later) the provisions of the section are to apply for all purposes of income tax for the year 1958–59 and subsequent years of assessment and also for estimating an individual's total income for the purposes of sur-tax for the year 1957–58.

Escape provisions

If the offending power which is caught in the mesh of the new legislation has not been exercised since 15th April, 1958, and the power is expunged from the settlement before 6th April, 1959, or such later date as the Commissioners of Inland Revenue may in any particular case allow, then the new provisions will not apply and the tax liability for this year and the sur-tax liability for last year will not be affected; nor will the provisions apply in future years. But this let-out provision only applies to settlements made before 16th April, 1958, where neither the settlor nor the wife or husband of the settlor has received or is entitled to any consideration or benefit in connection with the alteration of the settlement.

The Special Commissioners' circular points out that the discretion given the Commissioners of Inland Revenue to extend the time limit beyond 5th April, 1959, will only be exercised where the parties themselves have taken all reasonable steps to secure the extinction of the power in time and their failure to do so is due to circumstances beyond their control. Mainly, the discretion is designed to cover cases where an application to the court is necessary, a task which will be made easier in many cases by the Variation of Trusts Act, 1958.

Section 21 (5) of the Finance Act, 1958, makes it clear that ss. 404 and 405 of the Income Tax Act, 1952, apply to settlements made abroad, and is inserted to rectify an omission in the Act of 1952. In some cases s. 404 will apply without the aid of s. 21 of the Act of 1958, as in the *Countess of Kenmare's* case; in others it will apply only with the aid of s. 21.

Discretionary trusts

Section 405 of the Income Tax Act, 1952, applies to settlements the income of which is accumulated and provides that if the settlor or his wife has any interest in the settlement income, then, to the extent to which it is not distributed, the income is to be treated as the settlor's income. Section 22 of the Finance Act, 1958, in effect, extends s. 405 to cases

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where the income is not accumulated. It is a new section drawn in very wide terms and having no connection with the decision of the House of Lords in *Saunders'* case. It is deemed to be included in chap. III of Pt. XVIII of the Income Tax Act, 1952, immediately before s. 406, and is supplementary to ss. 404 and 405 of that Act.

Section 22

Section 22 (1) provides that if and so long as the terms of a settlement (wherever made) are such that any person has a discretionary power, whether immediately or in the future, to secure the payment or application of the settled property or income for the benefit of the settlor or the settlor's spouse, the settled income is to be treated as the settlor's income for tax purposes, unless it already falls to be so regarded under another section. The effect of the section is that if all the settlement income is subject to this discretionary power, all of it has to be treated as the settlor's income; while if part of the income or property is subject to the discretionary power, a corresponding part of the income has to be treated as that of the settlor.

When what is now s. 22 was first inserted in the Finance Bill at the report stage, the Solicitor-General gave three examples of cases against which the section is directed (see House of Commons Debates, 15th July, 1958, cols. 1062, 1063). They are:

(1) Where a discretion is conferred on someone to pay or apply the settled property in either of two ways: (i) for the benefit of the settlor or the settlor's spouse, or (ii) for the benefit of another beneficiary, and the effective decision as to how the funds are to be applied is taken not when the settlement is made but from time to time as the income arises from distribution. In such a case a settlor has not effectively alienated his income away from himself in advance.

(2) A covenantor makes annual payments for seven years to a trustee in trust for *X*, with power for the trustee to make the payments to someone else instead, e.g., the wife of the settlor. Such a case would not previously be caught.

(3) A settlement on trust to pay the income of the settled funds at discretion to any one or more members of a class including the settlor's wife would not be caught by the pre-1958 legislation; nor would a settlement in which neither the settlor nor his wife could become beneficially entitled to any part of the settled funds, but the settled funds could, at discretion, be applied for the wife's benefit, e.g., in reduction of an overdraft.

Exempted cases

Subsection (2), like the provisos in s. 404 of the Act of 1952, exempts cases where the discretionary power cannot be exercised within six (or more) years after the settled income first arises. In such event, the section does not apply for so long as the power cannot be exercised, and the income does not fall to be treated as that of the settlor until the six-year (or longer) period has elapsed.

There is, too, a let-out provision, as in s. 21, so that if settlements made before 9th July, 1958, which would be caught by s. 22 because of an offending discretionary power, are altered so that the discretionary power in favour of the settlor or his wife is removed from the settlement before 6th April, 1959, they will not be caught for income tax for this year or for sur-tax for last year. But this is provided the discretionary power has not been exercised after 8th July, 1958.

In the case of s. 22 (but not s. 21) there is also exemption if any income arising under or property comprised in the settlement only becomes payable to the settlor, or the husband or wife of the settlor, in the events specified in s. 405 (2), proviso, of the Act of 1952. The proviso refers to interests of the settlor which can only bring benefit in cases of bankruptcy or the death of the principal beneficiaries.

Sections 407 and 408

Section 407 of the Act of 1952 is intended to render nugatory for sur-tax purposes the payment of any sum by a settlor to the trustees of his settlement, in so far as that sum is less than the amount of undistributed income of the settlement in the same year. But any income which is treated as the settlor's income for tax purposes under s. 404 or s. 405 of the Act is deducted in calculating the undistributed income. The effect is that, to the extent that income of the settlement is not distributed (and therefore does not form part of a beneficiary's income) the settlor's payments, which would otherwise be allowable as a deduction in calculating his total income for sur-tax, are reduced.

Section 408 prevents a settlement from benefiting a settlor by his receiving capital sums from it instead of income. The section operates by making that part of the capital sum, which is within the amount of the settlement income for the year in question, itself a part of the settlor's income. Subsection (2) sets out the method of computing the settlement income for this purpose.

Income which is treated as that of the settlor under s. 22 of the Act of 1958 is to be excluded in calculating income of the trust for the purpose of ss. 407 and 408.

K. B. E.

Sir ARTHUR FFORDE has been elected a director of the Bank Insurance Trust Corporation, Ltd.

Mr. LOUIS NWACHUKWU MBANEFO, judge of the High Court of the Eastern Region, Nigeria, has been appointed a justice of the Federal Supreme Court of Nigeria.

Mr. THOMAS DUNBAR MORGAN, solicitor, of Liverpool, has been appointed by the Dean and Chapter of Liverpool Cathedral to be chapter clerk in succession to the late Mr. H. M. Alderson Smith.

Mr. PETER WATKIN-WILLIAMS, Puisne Judge, Trinidad and Tobago, has been appointed Puisne Judge, Sierra Leone.

The address of the Motor Insurers' Bureau will, from 27th October, be changed to "First Floor, 107 Cheapside, London, E.C.2." Telephone number Monarch 3811.

A Special University Lecture in Laws on English Feudalism and Estates in Land will be given by Professor S. E. Thorne, LL.B., M.A., Professor of Legal History at Harvard University, at University College (Eugenics Lecture Theatre), Gower Street, London, W.C.1, at 5 p.m. on Monday, 24th November. Admission is free, without ticket.

The whole of the legal groundwork necessary to industrial managers and executives is covered in a three-day course on industrial and factory law to be given on 21st, 22nd and 23rd October by Mr. Harry Samuels, O.B.E., M.A., Barrister-at-Law, under the auspices of the Industrial Welfare Society. The course, which will be held at the society's headquarters, Robert Hyde House, 48 Bryanston Square, London, W.1, is completely up to date with the latest changes in legislation.

The club, which was registered under the Small Lotteries and Gaming Act, 1956, promoted a lottery in aid of its funds. Sales of tickets for the lottery were made in the bar of the public house, and two draws took place in the smoke room. The licensee knew and approved of the sales and the draws, which were made by releasing from a canister containing table tennis balls, two numbered balls. The holder of the ticket which had the two numbers corresponding with the tennis balls won a prize. The licensee was convicted under s. 141 of the Licensing Act, 1953, of suffering gaming to take place on licensed premises, and the two officers of the club, who had sold the tickets for the draws, were convicted of aiding and abetting the commission of the offences. They appealed.

ASHWORTH, J., who delivered the first judgment, said that for the appellants it was contended that gaming involved something in the nature of a game in which the players participated continuously: accordingly, it was submitted that a person who buys a lottery ticket on a given day when the draw is not due to take place until one or more days have elapsed and the purchaser of the ticket may well be absent, is not gaming. That contention placed too restricted a meaning on the word "gaming." Undoubtedly some games involved gambling, but it did not follow that gaming involved a game. Moreover, the time factor did not enter into the problem in the way suggested. It was conceded that persons who played roulette were gaming; they were staking their money in a proceeding the outcome of which was dependent merely on chance. There was no difference in principle between that form of proceeding and the one involved in the present case. As to the effect of the Small Lotteries and Gaming Act, 1956, which provided that certain small lotteries were deemed not to be unlawful, once it was established that gaming was involved, a licensee could not lawfully suffer it to take place on his licensed premises. Section 141 of the Licensing Act, 1953, was not affected by the Act of 1956, and, accordingly, the appeal should be dismissed.

LORD GODDARD, C.J., agreeing, said that the Legislature had always been at pains to prohibit public houses being used for the purpose of gambling whether by betting or gaming, and s. 4 (6) of the Act of 1956 was intended to maintain this absolute prohibition, notwithstanding that a particular form of gaming for particular purposes was exempted from penalties if conducted elsewhere.

DONOVAN, J., agreed. Appeal dismissed.

APPEARANCES: *Sir Frank Soskice*, Q.C., and *Stephen Brown* (*Field, Roscoe & Co.*, for *Colin Langley & Smith*, Birmingham); *B. S. Wingate-Saul* (*Sharpe, Pritchard & Co.*, for *M. P. Pugh*, Birmingham).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [3 W.L.R. 528

Probate, Divorce and Admiralty Division

NULLITY: EPILEPSY AT TIME OF CEREMONY: WHETHER COMPETENT TO INVESTIGATE WILFUL REFUSAL

Iddenden (otherwise Brains) *v.* Iddenden

Collingwood, J. 22nd July, 1958

Petition for nullity.

The parties went through a ceremony of marriage in March, 1956. After some six weeks the wife left the matrimonial home and returned to her parents. The marriage was never consummated. In November, 1956, the wife presented a petition seeking a declaration of nullity on the grounds of wilful refusal to consummate the marriage, incapacity and that the husband was at the time of the marriage subject to recurrent fits of epilepsy. By his answer the husband denied the non-consummation was due to his wilful refusal or incapacity, and that at the time of the marriage he was subject to recurrent fits of epilepsy. He alleged that the non-consummation was due to wilful refusal by the wife or, alternatively, incapacity on her part, and cross-prayed for a declaration of nullity. By her reply the wife denied the alleged wilful refusal or incapacity on her part. At the hearing of the suit Collingwood, J., found that the husband was suffering from recurrent fits of epilepsy at the time of the ceremony of marriage, that the wife had remained ignorant of the nature of the husband's malady until after she had left him, and that the wife was entitled to the declaration sought. Counsel for the husband then submitted that, the mutual allegations of incapacity having been abandoned, the hearing should continue as to the issue of wilful refusal to consummate the marriage. The matter is reported only on this point.

COLLINGWOOD, J., said that it would in his opinion be quite unreal for the court, having found that, at the time of the marriage when the wife's right to relief crystallised, the husband was suffering from recurrent fits of epilepsy, to then go on and investigate the question of wilful refusal. The wife was, therefore, entitled to a decree of nullity under s. 8 (1) (*b*) of the Matrimonial Causes Act, 1950.

APPEARANCES: *Norman Lermon* (*Edward F. Iwi*, for *Hanchett, Copley and Hails*, Edgware); *L. J. Solley* (*Pearce & Sons*).

[Reported by Miss ELAINE JONES, Barrister at-Law] [1 W.L.R. 1041

COMPANY NAMED AS EXECUTOR: AMALGAMATION WITH ANOTHER COMPANY AFTER COMMENCEMENT OF PROBATE ACTION

In the Estate of Skinner, deceased

Sachs, J. 31st July, 1958

Adjourned summons.

In August, 1955, Grindlays Bank, Ltd. (Grindlays) and others commenced an action for probate of a will of March, 1954, of which they were the executors. Two of the defendants to the action set up a will of December, 1948, of which Grindlays were the sole executors, and the third defendant alleged that the deceased had died intestate. In April, 1956, Grindlays were appointed administrators pending suit of the estate, and at that date they had already so acted as executors under the 1954 will as to disentitle them to renounce that position. By an order of July, 1957, sanction was given to a scheme of arrangement and amalgamation under ss. 206 and 208 of the Companies Act, 1948, between Grindlays and the National Bank of India, Ltd. (National) at which date the whole of the £500,000 capital of Grindlays was beneficially owned by National. The scheme transferred to National the whole of Grindlays' assets and liabilities but not "property vested in Grindlays as . . . the personal representative of any deceased person." Grindlays, to whom National gave very full indemnities, continued their existence but would, at some future date, be dissolved. Clause 7 of the scheme provided that, after the transfer date, Grindlays should not take out, or cause to be taken out, any grant of representation to the estate of any deceased person, but should continue its duties existing at the date of transfer as personal representative or as trustee until dissolved. On 7th November, 1957, an order in furtherance of the scheme was made, one of the provisions of which was to the effect that "all proceedings pending by or against the transferor company on 1st January, 1958, other than those to which the transferor company is a party as the personal representative of any deceased person, be continued by or against the transferee company." The plaintiffs issued a summons to determine, having regard to the terms of the scheme and of the order of 7th November, 1957, whether either Grindlays or National could or should continue the probate action and whether either of them could or should act as personal representative of the deceased under either the 1948 or the 1954 will.

SACHS, J., said that the answers to the questions arising for decision depended partly on the general law and partly on the construction of the scheme. It had been axiomatic since before the days of Blackstone's Commentaries that, at common law, there could be no assignment of the office of executor as it was one of personal trust. During the hearing of the summons it had become common ground that already before they were appointed as administrators pending suit, Grindlays had so acted as executors as to disentitle them to renounce that position under the 1954 will, and also so as to entitle the court to compel them, if thought fit, to continue to act as executors under that will, if proved. By virtue of the order of 18th April, 1956, the property of the deceased vested in Grindlays by virtue of s. 163 of the Supreme Court of Judicature (Consolidation) Act, 1925, remained vested in them on the transfer date and would continue to remain vested in them unless and until some order of the court provided otherwise. In no event could the property

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of the deceased be held to have vested in National. It had been made clear by the speeches in *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* [1940] A.C. 1014, that schemes and orders made by virtue of ss. 206 and 208 of the Companies Act, 1948, could only transfer such rights, powers, duties and property as were capable of being lawfully transferred by a party to the scheme if no such sections of the Companies Act existed. If, however, on a proper construction of the terms of a scheme, some part of it happened to order an act which, had there been no scheme, the parties could not, either in relation to the interests of third parties or otherwise, bind themselves to do, then that part of the scheme would have to be treated as a nullity in so far as it purported so to order. The latter principle equally applied where a scheme expressly prohibited an act which the parties could not, under the general law of the country, bind themselves to refrain from doing. On a normal construction of the words of the order of 7th November, 1957, the present action was not one ordered to be continued by National. If, contrary to that view, the words "personal representative" had, in the context of the scheme as a whole, to be construed as referring only to a "personal representative who had been granted probate," then the order would purport to cause a right or duty of Grindlays as an executor to be carried out by some third party, would contain a provision repugnant to the general law of this country, and would to that extent have had to be treated as of no effect. There was no other provision in the scheme or order that could lay upon National any of the rights, duties or powers of an executor of the deceased, and accordingly it followed that National was neither entitled to be nor could be substituted as a plaintiff in the action, nor could there be granted to National probate of the 1954 or of the 1948 will. There remained the question whether Grindlays were entitled to and should continue to act as plaintiffs in the action; and, if so, whether probate could be granted to them if either the 1954 or the 1948 will were proved. Any difficulty on that point derived from the provisions of sub-clauses of cl. 7 of the scheme, which either purported to prohibit Grindlays continuing the action or did not. If cl. 7 (1) did prohibit Grindlays from taking out a grant of representation in the action, it was, to that extent, to be disregarded and treated as of no effect, as the prohibition would be one which could not properly be embodied in a scheme under ss. 206 and 208. Thus, whichever of the rival interpretations of cl. 7 (1) put forward by counsel were adopted, Grindlays in law could and, indeed should, continue to act as first plaintiffs. The Public Trustee Rules, 1912, as amended, had chosen to make the qualification for a trust corporation a matter of capital and not a matter of assets. Grindlays still existed as a legal entity, their capital still complied with the test laid down in the Public Trustee Rules, and they thus remained a trust corporation. Accordingly, there was no obstacle to their being granted probate as such. The answers to the questions set out in the summons were accordingly as follows: (1) Yes. (2) No. (3) and (4) Probate of either will, if proved, could be granted to Grindlays. Order accordingly.

APPEARANCES: *D. Tolstoy* (*H. S. L. Polak & Co.*); *Oliver Smith* (*Sanderson, Lee, Morgan, Price & Co.*); *A. Richard Ellis* (*Ellis, Piers & Co.*); *R. Bayne Powell* (*O. L. Blyth*).

Reported by Miss ELAINE JONES, Barrister-at-Law] **[1 W.L.R. 1043**

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Bath Corporation Water Order, 1958. (S.I. 1958 No. 1619.) 6d.

Bolton Water Order, 1958. (S.I. 1958 No. 1615.) 6d.

Durham County (Water Charges) Order, 1958. (S.I. 1958 No. 1620.) 5d.

Folkestone Water Order, 1958. (S.I. 1958 No. 1632.) 8d.

Herts and Essex Water Order, 1958. (S.I. 1958 No. 1621.) 6d.

Herts and Essex Water (No. 2) Order, 1958. (S.I. 1958 No. 1622.) 6d.

London–Bristol Trunk Road (Newbury East—West Relief Road) (Variation) Order, 1958. (S.I. 1958 No. 1645.) 5d.

London–Edinburgh–Thurso Trunk Road (Beilby Wood Diversion) Order, 1958. (S.I. 1958 No. 1613.) 5d.

Mid and South East Cheshire Water Board Order, 1958. (S.I. 1958 No. 1616.) 6d.

Newcastle and Gateshead Water (No. 2) Order, 1958. (S.I. 1958 No. 1617.) 4d.

Opencast Coal (Notice of Work) Regulations, 1958. (S.I. 1958 No. 1649.) 5d.

Prescelly Water Order, 1958. (S.I. 1958 No. 1644.) 8d.

Process (Temporary Importation) Regulations, 1958. (S.I. 1958 No. 1642.) 5d.

Retention of Cable under a Highway (County of Huntingdon) (No. 1) Order, 1958. (S.I. 1958 No. 1639.) 5d.

Sea Fisheries (Scotland) Byelaw (No. 55), 1958. (S.I. 1958 No. 1646 (S.75).) 5d.

Stopping up of Highways (County of Bedford) (No. 5) Order, 1958. (S.I. 1958 No. 1625.) 5d.

Stopping up of Highways (County of Chester) (No. 14) Order, 1958. (S.I. 1958 No. 1618.) 5d.

Stopping up of Highways (County of Cornwall) (No. 2) Order, 1958. (S.I. 1958 No. 1637.) 5d.

Stopping up of Highways (County of Derby) (No. 15) Order, 1958. (S.I. 1958 No. 1638.) 5d.

Stopping up of Highways (County Borough of Great Yarmouth) (No. 2) Order, 1958. (S.I. 1958 No. 1626.) 5d.

Stopping up of Highways (County of Hereford) (No. 1) Order, 1958. (S.I. 1958 No. 1609.) 5d.

Stopping up of Highways (County of Kent) (No. 15) Order, 1958. (S.I. 1958 No. 1614.) 5d.

Stopping up of Highways (London) (No. 38) Order, 1958. (S.I. 1958 No. 1627.) 5d.

Stopping up of Highways (London) (No. 40) Order, 1958. (S.I. 1958 No. 1628.) 5d.

Stopping up of Highways (County of Middlesex) (No. 11) Order, 1958. (S.I. 1958 No. 1629.) 5d.

Stopping up of Highways (County of Oxford) (No. 10) Order, 1958. (S.I. 1958 No. 1610.) 5d.

Stopping up of Highways (City and County Borough of Portsmouth) (No. 1) Order, 1958. (S.I. 1958 No. 1611.) 5d.

Stopping up of Highways (County of Stafford) (No. 13) Order, 1958. (S.I. 1958 No. 1630.) 5d.

Stopping up of Highways (County of Worcester) (No. 15) Order, 1958. (S.I. 1958 No. 1612.) 5d.

Teachers (Training Authorities) (Scotland) Regulations, 1958. (S.I. 1958 No. 1634 (S.74).) 2s. 1d.

Town and Country Planning (General Development) (Scotland) (Amendment) Order, 1958. (S.I. 1958 No. 1653 (S.78).) 5d.

Warrington Water (No. 2) Order, 1958. (S.I. 1958 No. 1623.) 6d.

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COMPENSATION FOR ACCIDENTS—II

WE can now consider the cases in the present situation where a victim in a road accident may receive no compensation. It is the writer's contention that these cases can be met only by a scheme for a central insurance fund administered on a non-profit basis by a Government insurance office or a State corporation, which would pay compensation, regardless of fault, in all cases of death or bodily injury suffered on the roads. The details of the proposal will appear from the subsequent discussion of particular cases. The writer cannot claim any originality for the main proposal, since it has been advocated in the past, especially overseas. He can only claim that he independently thought of a number of subsidiary proposals, only to find later, upon wider reading on the topic, that most of his proposals had been put forward previously by others (in particular by Ross Parsons, in vol. 3 [1955] University of Western Australia *Annual Law Review* 201; Arthur Suzman, Q.C., in [1955] 72 [Pt. IV] *South African Law Journal* 374; and Glanville Williams, in a footnote, No. 78, in an article in vol. 4 [1951] *Current Legal Problems* 137).

The " hit-and-run " driver

One of the cases not covered by existing law or the Motor Insurers' Bureau agreement is that of the regrettably frequent " hit-and-run " driver; in other words, the unidentified motorist who causes an accident involving bodily injury to another person and then leaves his victim on the road and drives on to escape detection. In a system of compensation based on the fault of the defendant no provision can be made for such a victim, since fault cannot be placed at the door of any identified person. It is only in a scheme for compensation regardless of fault that such a victim can be properly compensated.

The Cassel Committee (1937) in their Report (Cmd. 5528), p. 168, said they could not, in their scheme for a central fund, deal with the case of a third party injured by an untraced motorist. In their opinion, the grant to the victim of any right to claim against the central fund " would be calculated to lead to such abuses as to render such a course totally unsuitable." Clearly the Committee must have been thinking of fraudulent claims by persons not genuinely injured by a motor vehicle. But this surely is a matter of evidence, and in most cases of injury by a hit-and-run driver the circumstances would show whether a claim was genuine or not. Even if one or two fraudulent claims should slip through, this alone is not a valid reason for depriving all victims of untraced drivers of any compensation. It might have to be a case of suffering some evil to achieve a far greater good.

The Minister of Transport, however, in a statement in the House of Commons on 12th November, 1945 (Hansard 415, H.C. Debates, col. 1869), said that the Government cannot dissent from the view of the 1937 Committee on this point and accordingly the Minister had not covered such cases in his agreement with the Motor Insurers' Bureau. But he continued: " I am glad to say that the insurers have informed me that they do not intend to exclude them entirely from their purview, and where there is reasonable certainty that a motor vehicle was involved and that but for its unidentifiability a claim might lie, they will give sympathetic consideration to the making of an *ex gratia* payment to the victim." So we have, at least in practice, departed in one respect from the principle that a definite person must be proved at fault; here the principle of compensation alone is predominant. It is difficult to see why this matter should be left to the mercy of the Motor Insurers' Bureau with their *ex gratia* payments. The average motorist would not complain if a penny or two were added to his insurance premium so that the Motor Insurers' Bureau should be compelled to assume liability in all such cases. (There are other recent instances of such " collective compensation," e.g., the Solicitors' Compensation Fund now maintained under s. 32 of the Solicitors Act, 1957.)

Injury caused without negligence

There are cases in which, despite adequate evidence as to the circumstances in which the injury occurred, it is found that the accident was due to neither the negligence of the victim nor that of any other person. In such cases of " pure accident " there is scope for the argument that the loss should be spread by compulsory insurance, rather than left on the shoulders of the innocent victim. It is the use of motor vehicles on the road even at normal speeds which leads to the possibility of serious injury being caused without negligence. Hence there is every justification for asking all who benefit from the normal use of motor vehicles to share collectively the risk of road injuries without fault.

Gratuitous passengers

It will be remembered that s. 36 (1) (*b*) (ii) of the Road Traffic Act, 1930, excluded from the ambit of compulsory insurance liability in respect of the death of or bodily injury to persons being carried in the vehicle without charge. In the case of a vehicle in which passengers are carried for hire or reward, however, insurance is compulsory; so that we are now concerned only with gratuitous passengers outside the scope of " third-party risks " in the 1930 Act. A negligent driver who causes injury to such a passenger, is, of course, liable to pay damages to him at common law, and any prudent motorist will voluntarily take out a comprehensive insurance policy to cover himself in this respect. (It would be interesting to know what proportion of motorists voluntarily take out insurance cover beyond that required by the 1930 Act.)

Why should not all motorists be compelled to insure against this potential liability? The mere fact that the passenger is receiving a gratuitous benefit from the driver does not mean at common law that he thereby consents to run the risk of suffering injury caused by the driver's negligence and to forgo compensation (see on the maxim *volenti non fit injuria*, the case of *Dann* v. *Hamilton* [1939] 1 K.B. 509). If the motorist is liable at common law to pay such damages, it is hard to see why he should not be forced to insure against this risk. The exception in the 1930 Act seems to be based on the notion that one should not look a gift horse in the mouth. An amendment in 1944 to the Western Australian Act requiring compulsory insurance placed the gratuitous passenger in exactly the same position as the fare-paying passenger, and this is obviously fair. The alleged risk of the gratuitous passenger presenting a fraudulent claim in collusion with the driver is not a real one.

Since the Contributory Negligence Act the situation is also anomalous in another respect. Suppose an accident in which a gratuitous passenger *Z*, in a car driven by *A*, is injured in a collision with a car driven by *B*. Both drivers were at fault,

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A being, say, 90 per cent. to blame and *B* only 10 per cent. If *A* has only compulsory insurance cover, *Z* can obtain payment of full damages for his injury if he sues *B* alone, since *B* must be covered by compulsory insurance. *B's* insurance company, through *B*, has a right to claim contribution from *A*, but he may not be worth suing if he is not insured in respect of this risk. *Z* receives full compensation through compulsory insurance though his own driver *A* was 90 per cent. to blame; but he would have received nothing through compulsory insurance had *A* been solely to blame.

Accidents caused by uninsured cyclists or pedestrians

There has been correspondence recently in *The Times* which brings to public attention the fact that, though the negligence of a cyclist may cause a serious accident, he is not compelled to be insured against this risk. Motorists complain also that the negligence of a pedestrian in stepping on to the roadway without looking often leads to an accident, since the motorist, in swerving to avoid the pedestrian, may injure a third person. Cyclists and pedestrians are seldom sued for damages in such cases, however, since they are frequently "not worth powder and shot."

One of the major arguments against any scheme for insurance compensation for all road injuries, irrespective of fault, is that it would put the whole burden of compensating road victims on the motoring community, which is unfair when some accidents are caused by cyclists, pedestrians or straying animals. There are, in particular, frequent cases where young and irresponsible children cause road accidents by rushing on to the road and thereby forcing motorists to swerve suddenly to avoid them. Although in *Carmarthen County Council* v. *Lewis* [1955] A.C. 549 the House of Lords placed liability for a fatal accident caused in this way on the local education authority for its failure to prevent a young child from straying alone on to the road, there must be cases where a victim receives no compensation, because the child is not worth suing even if he could be said to be at fault.

Now all members of the community are pedestrians on our roads at some time of the day, and many are cyclists. It would be impracticable to impose a system of compulsory third-party insurance on cyclists which was to be enforced in the same way as in the case of motorists under the 1930 Act, without a compulsory system of numbering and registering all cycles. Such a plan would involve a tremendous amount of administration, and probably no government would like to impose such a burden on the police and local authorities. Any system of compulsory third-party-risks insurance to be taken out by all pedestrians would clearly be impossible on the basis of the present scheme under the 1930 Act, whereby each insurance policy is individually arranged between the insured and the insurance company of his choice. The only way, it is submitted, in which pedestrians (i.e., all members of the community) could be compelled to contribute to any insurance fund of this kind is by means of taxation.

If the Exchequer contributed an annual sum calculated as a stated proportion of the amount found necessary to administer a general insurance scheme for road accidents, this would mean that each member of the community was being compelled indirectly to contribute in his capacity as a pedestrian. If the proportion of road accidents caused by cyclists was not considered high enough to warrant individual registration of cycles and collection of individual insurance premiums from cyclists, then account could also be taken of such accidents in determining the Exchequer contribution. If fault was to remain the basis of the payment of compensation to a road victim, taxation could thus be justified as compulsory insurance in respect of death or bodily injury caused through the fault of any member of the community in his capacity as a pedestrian or a cyclist. But if taxation was to support any comprehensive insurance scheme for road accidents, the writer submits that it would be far better to abandon the old notion of "fault-liability" insurance, and to think rather in terms of "comprehensive-accident" insurance. The scheme would then amount to compulsory insurance cover for everyone in respect of road injuries, with much the same result (but with far fewer administrative difficulties) as if the law compelled everyone to take out a personal accident policy with a private insurance company. It would be Utopian to expect all members of the community ever to be persuaded to take out such cover voluntarily.

The proportion of the Exchequer contribution to the fund, in order to be equitable as regards the motoring public, ought to be fixed on the basis of a statistical estimate of the number and seriousness of road accidents caused through the fault of cyclists and pedestrians as a class, compared with those caused through the fault of motorists. Any such estimate would necessarily be approximate, but this aspect of the scheme would have the advantage of avoiding the main objection of motorists to earlier schemes for compensation, regardless of fault. For motorists alone would no longer be asked to bear the cost of compensation even in cases where it could, if necessary, be proved that it was not a motorist at fault. A precedent for such a contribution from the Exchequer to an insurance fund may be found in the Industrial Injuries Fund. (The statistical tables published by the Ministry of Transport and Civil Aviation may be some guide in assessing the Exchequer contribution. "Road Accidents, 1956" reveals that in the 216,172 accidents in 1956 the police regarded pedal cyclists as contributing to the accident in 27,911 cases; pedestrians in 53,239 cases; passengers in 14,241 cases; drivers in 114,352 cases; dogs in the carriageway in 2,476 cases; other animals in 1,309 cases, etc. These figures of course give no guide to the seriousness of the bodily injuries caused by the different classes of road users at fault, nor do they exclude cases where several factors may have contributed to one accident.)

Even if this objection were overcome, motorists would probably oppose the scheme on the ground that it would involve increased cost to themselves. But to-day with the present scheme of compulsory insurance against third-party risks, together with the voluntary practice of many motorists in taking out comprehensive cover, we have already advanced probably 70–80 per cent. of the way towards compensation through insurance for all road injuries, since approximately that proportion of serious road accidents is in fact caused through the negligence of motorists. Surely it is not impossible for us to attempt to cover the remaining 20 per cent. of road injuries at present outside the scope of compulsory "fault" insurance, especially when motorists would not be expected to bear the additional cost alone. (These percentages are very approximate, but they are suggested by figures supplied to the House of Lords Select Committee in 1933 by the insurers' representatives, who said that in an investigation of 20,222 claims during 1932–33 it was found that only 22·4 per cent. of the claims were rejected so that no payment was made to the victim.)

Even if the cost of the scheme to motorists is somewhat higher than at present, would not the average motorist be prepared to bear the extra cost if he knew that every victim of an accident involving his car would be compensated, even

when he (the motorist) was not at fault. Even an innocent motorist may desire to be a good Samaritan towards the unfortunate victims of road accidents. In any case, we should remember that even those who are not motorists contribute indirectly through taxi and bus fares to the insurance premiums paid by motorists. Perhaps the fairest distribution of cost among the motoring community would be to add a small tax on petrol, say ½d. a gallon.

Another inducement for the State to contribute to the scheme through taxation would be the reduction in judicial business through the abolition of civil running-down cases; this might considerably relieve the taxpayer's burden for the administration of justice.

If it were accepted that taxation should bear part of the cost of a central insurance fund covering all road accidents, then it is very unlikely that any government would permit private shareholders to make a profit through the administration of the scheme. The existing insurance companies would not be interested in administering the scheme themselves on a non-profit basis through a greatly expanded Motor Insurers' Bureau. It would seem inevitable in practice that a government insurance office or a State corporation must administer the scheme. The writer is not in favour of extending bureaucracy except where that is the only way to overcome frequent cases of great hardship to individuals, and he submits that road accidents constitute such an exception. (Mr. Pollard's scheme imposed absolute liability, irrespective of fault, on the owner of the motor vehicle involved in an accident; the cost of the increased compulsory insurance cover was to be borne by motorists alone. The private insurance companies could continue to administer such a scheme as his, provided the Motor Insurers' Bureau continued to cover failures to insure, and cases where the motor vehicle was not identified.)

In Saskatchewan a scheme not based on fault has been in force since 1946; it is administered on a non-profit basis, by a Crown corporation, the Saskatchewan Government Insurance Office. (See J. Green, "Automobile Accident Insurance Legislation in the Province of Saskatchewan," vol. 31, *Journal of Comparative Legislation*, pp. 39–53.)

Lack of evidence and unreliable evidence

It has frequently been pointed out that the recovery of compensation depends not simply on the fact of the defendant's negligence but on *proof* of his negligence. Road accidents often happen in a split second of time, and no witness can hope either to observe accurately all the circumstances immediately prior to the accident, or to be able to recount accurately many months later the imperfect observations he did make at the time. Too often the evidence of a witness in a running-down case will depend more on his reconstruction after the event of what he thinks must have happened rather than on his actual observations. Frequently the attention of an independent witness is drawn to the circumstances of an accident only when he hears the sound of the collision, and though he can recount what he perceived with his senses immediately *after* the collision, his account of what happened just before the collision will be based on his own unconscious deductions from the facts he observed immediately after the collision. (Glanville Williams has aptly called this "fallacious 'reasoning back'".) Apart from this there is the element of human fallibility in the court which hears the action; even if many independent witnesses are available, the result of the action involves some degree of chance. A cynic might well regard running-down actions as a lottery.

But the problem of the injured person is much more difficult when no independent witness saw the accident, or when the victim cannot look for witnesses immediately after the accident because he is injured or unconscious. If the victim of the accident was killed, then the prospect of his dependants bringing a successful action is negligible in the absence of witnesses. A court is not anxious to infer negligence on the part of the defendant solely by deductions from the position of the vehicles and victims after the collision.

Again, where a seriously injured victim does survive, he is likely to find that he has no clear memory of the events immediately before the accident. No one can deny that the difficulty of proof has deprived perfectly innocent victims of all compensation, nor that the existence of independent witnesses is purely fortuitous. So long as compensation is coupled with fault, however, we naturally hesitate to give compensation to the victim if this involves labelling the defendant as "negligent" on insufficient evidence. A comprehensive road accident insurance scheme, however, is designed simply to alleviate the lot of the victim, and it is the fact of the injury, and not the proof of negligence, which is the basis of compensation to the victim.

(To be continued)

D. R. H.

OHIO STATE UNIVERSITY

"THE SOLICITORS' JOURNAL," 16th OCTOBER, 1858

On the 16th October, 1858, THE SOLICITORS' JOURNAL summarised the Board of Trade report on railways. It stated "that the total length of line authorised by Parliament down to the end of 1857 amounted to 15,331 miles, but of this 1,504 miles had been abandoned by subsequent local Acts or by warrants under the authority of a general Act passed in 1847; and consequently there remain 13,827 miles . . . Of these 9,019 miles were open at the end of 1857 . . . The length of new line reported to be in course of construction on 30th June, 1857, was 1,004 miles and of these 230 miles had been opened before the end of 1857 and the number of persons employed on them was 44,037 . . . The length of line open for traffic in the United Kingdom on 30th June, 1857, was 8,942 miles . . . The number of stations was 3,121. With regard to the money invested in railways the report states that the capital raised on 31st December, 1857, was £314,959,626 . . . The working expenses of railways have increased in England and Wales from £1,352 per mile in 1854 to £1,564 in 1857, but they have decreased in Scotland and in Ireland . . . The general average of working expenses throughout the United Kingdom has been 47 per cent. upon the gross receipts, both in 1856 and 1857. The number of Railway Bills which came before Parliament in the session of 1857 was 130."

The trial for murder by poisoning of Mr. and Mrs. Frederick Henry Seddon will be the subject of the next "The Verdict of the Court" feature in the B.B.C. Home Service on Tuesday, 21st October, at 8 p.m. There will be a postscript by Lord Birkett.

Mr. R. Bath, solicitor, of Glastonbury, left £26,500 net.

Mr. J. T. Jones, solicitor, of Gloucester, left £41,564 net.

Mr. A. Lloyd-Jones, solicitor, of Ealing, W.5, left £30,253 net.

Mr. F. D. Wardle, solicitor, of Bath, left £20,077 (£17,333 net).

Landlord and Tenant Notebook

ANTICIPATING INFLATION—II

I MENTIONED in last week's article that the judgments delivered by Denning and Morris, L.JJ., in *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.* [1956] 2 Q.B. 127 (C.A.) criticised the reddendum interpreted in that case as not fulfilling the requirements of a true gold clause, the suggestion being that if it had called for gold sterling of a specified weight and fineness, or made it clear that the gold sterling was to be regarded as a commodity, one obstacle to the landlords' success would not have been present. But Denning, L.J., was strongly of the opinion that even so the bargain would have been unenforceable because contrary to public policy, and the observations and reasoning to that effect may well deter landlords from testing the effect of an improvement.

Public policy

At this stage I propose to refer to the dissenting judgment of Harman, J., who was in favour of construing the reddendum so as to give the plaintiff landlords what the parties must, in the light of circumstances, be considered to have intended, and who also did not consider that any harm would be done if effect were given to those intentions: "I find nothing in public policy which should forbid a landlord parting with his land for a long term of years from attempting to protect himself against fluctuations in the value of money. Corn rents are familiar in English law, and rent may be tied to the value of minerals."

But Denning, L.J., reasoned that the principle "a man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time" was so well established that it was "disturbing" to find a creditor inserting a gold clause in a domestic transaction; and "if we are now to hold gold clauses valid in England for internal payments we may be opening a door through which lessors and mortgagees, debenture-holders and preference shareholders, and many others, may all pass. We might find every creditor stipulating for payment according to the price of gold; and every debtor scanning the bullion market to find out how much he has to pay. What then is to become of sterling? It would become a discredited currency unable to look its enemy inflation in the face. This should not be allowed to happen."

Public policy has been described as an unruly horse, and in countries where, otherwise than as the result of the use of gold clauses, inflation at one time assumed truly gigantic proportions, there are people who could not be expected to see eye to eye with Denning, L.J., in his objection to the device. I have known one family to be ruined when, their capital consisting of money invested in mortgages, the mortgagors redeemed the properties concerned with very little effort, and very little benefit to the creditors. And, as Harman, J., appreciated, it must be galling to a landlord to find, say, that his shopkeeper tenant has been able to raise prices while paying the same rent. Nevertheless, it may well be observed that the learned judge overlooked the difference between reserving a rent fluctuating according to the value of the products of the land demised and reserving a rent to be varied according to the value of something which it did not produce.

Leaving "sterling" out of it

The effect is that neither the reddendum used in *Treseder-Griffin* v. *Co-operative Insurance Society, Ltd.*, nor the gold clause illustrated by *Feist* v. *Société Intercommunale Belge d'Electricité* can be relied upon by intending landlords. But one may wonder whether a more imaginative device, one showing that the parties had, as it were, dismissed the value of currency from their minds, would necessarily founder on the public policy rocks. Suppose, for instance, that rent were reserved, to use Coke's language, "in delivery of" gold watches, gold toothpicks, or simply gold leaf (and without, of course, any provision for equal quarterly payments)? It might, no doubt, be argued that the effect was that of a gold clause; but the Exchange Control Act, 1947, s. 1 of which prohibits the purchase of "any gold or foreign currency," and s. 2 of which obliges one to offer any gold or any foreign currency which may be at one's disposal to an authorised dealer, defines "gold" as "gold coin or gold bullion." It does not define bullion which, in and for the purposes of the Currency and Bank Notes Act, 1954, "*includes* any *coin* which is not current and legal tender in the United Kingdom." Treasury control may indirectly affect the availability of such objects as I have named, in so far as they are products of bullion; but Denning, L.J.'s "If we are now to hold gold clauses valid in England . . ." would not cover such a reddendum.

Arbitration

It may be possible to anticipate inflation by an agreement to vary rent by arbitration. The provisions of the Agricultural Holdings Act, 1948, s. 8, as amended by the Agriculture Act, 1958, s. 2, are, no doubt, connected with the security of tenure conferred by the Act; nevertheless, they can be and are used to counteract the effects of depreciation in the value of money. There is no reason why, if an intending tenant asks for a fourteen years' lease, and the intending landlord's attitude is that he is not prepared to consider so long a term because he fears that the real value of the rent will drop during its currency, a compromise should not be attained on these lines. The Agricultural Holdings Act measure is the rent "properly payable," now defined as the rent at which the holding "might reasonably be expected to let in the open market by a willing landlord to a willing tenant, etc." I suggest that any lease might include provision for variation on these lines, at decent intervals.

Cost of living

Another device, for which a precedent will be found in the 1958 Supplement to the Encyclopædia of Forms and Precedents, is to provide for variation according to fluctuations in the index of retail prices issued by the Ministry of Labour and National Service. The precedent calls this the Government Index of Cost of Living and contemplates only increases in points; the official booklet on "Method of Construction and Calculation of the Index of Retail Prices" points out that "Cost of Living Index" is inaccurate and may be misleading because the expression suggests that only basic necessities are taken into consideration. In fact, so much "weight" is attached to each of a large variety of goods and services, divided into ten groups, e.g., mutton,

divided into home-killed and imported, each subdivided into leg (with bone) and best end of neck; dog biscuits; girls' lace-up shoes; petrol; alarm clocks; postage; admission to First Division football matches, are among the matters taken into account. The index is calculated in respect of prices on one selected day in each month; approximately five weeks later the figure has been calculated, and, after being communicated to the Press, is published in the *Ministry of Labour Gazette*. A reddendum providing automatically for additional (or reduced) rent of so much for each point above (or below) the figure given when the lease commences might well be a better device than a provision for arbitration preceded by headaches and followed by heartaches.

One objection might be that the Index itself makes housing one of the ten groups (No. IV) (subdivided into rent, rates and water charges, charges for repairs, materials for home repairs (the items priced in the last-mentioned case being paint brush and paint)). According to many critics, far too little "weight" has been attached to the "rent" item (36 out of 1,000). But the point is, if all leases and tenancy agreements were to adopt the suggested clause what would become of the effectiveness of the Index, *a fortiori* if the idea spread and the suppliers and consumers of mutton, dog biscuits, shoes, clocks, etc., arranged for prices to be fixed by reference to that Index?

R. B.

HERE AND THERE

SILENT RITUAL

"No trumpets!" one said to oneself with acute dissatisfaction as the silent march of the judges of England progressed gravely up the Central Hall of the Law Courts on the first day of the Michaelmas Term. Any self-respecting assize town can provide a brace of trumpeters to act as clamorous harbingers of the metropolitan justice which is about to be thankfully received at the hands of a single judge, so why not a triumphant trumpet voluntary to greet British justice in the mass? There were trumpeters there in cloth of gold when Queen Victoria first opened the place; you can see them in the picture on the east wall. Why have they never returned? No procession, however magnificent, is really as effective without music. The ear demands its satisfaction as well as the eye. What mum mummery would be the most splendid ecclesiastical ceremony without the pealing organ, the full voic'd quire and the anthems clear. One might have expected the distinguished ecclesiastical architect who designed the Law Courts to have found room for a pealing organ somewhere in the Central Hall. He did everything else to make it look as much like the upper church at Assisi as possible.

MUSIC TO SOOTHE

BUT it was not only at the unfolding of the procession itself that the lack of a musical accompaniment was very profoundly felt. Every year the triple rows of chairs on either side of the great hall are early filled with eager spectators while others stand behind or group themselves on steps and other points of vantage. Strangers, relatives, members of the legal profession, robed and unrobed, clerks, officials—all the lot of them are there by one o'clock. After years of experience no one seems to know, even approximately, the probable duration of the Lord Chancellor's breakfast. So everyone waits, initial eager interest gradually degenerating into a rather querulous impatience and ravenous discussions whether or not there will be time to snatch a quick snack or a quick drink before anything happens. Nothing ever does happen until a quarter to two at the earliest and there would always have been time for quite a leisurely meal. But all this fidgety impatience could have been soothed and smoothed away by a little music. And who better able to provide it than the Royal Courts of Justice Music Club? A few months ago we noted its strange other-worldly night-time activities deep in the gothic shades of the darkened and deserted building. Surely this is the occasion of all occasions for it to emerge from its bat-like underground, esoteric secret life and come into its own in the broad light of day. It is versatile enough to move with equal ease in the realms of classical music and skiffle. Since the waiting audience would probably be in the mood for the "Palm Court" style, complete with "Iolanthe" and "Trial by Jury," no doubt it could oblige in that vein. If required, it could doubtless raise Musæus from his bower or bid the soul of Orpheus sing. It would have to find out from the Superintendent of the Law Courts what was required. Anyhow, before next October there is time to make arrangements to fill the hitherto horrid vacuum with sweet beguiling sounds.

THE FIRST BOW

THIS year there was, of course, a special press of spectators about the court of the Lord Chief Justice to see Lord Parker take the prescribed oaths. No doubt for what were taken to be good administrative reasons the doors were kept locked and guarded until almost the very last minute before the judges began to take their places on the Bench. First, relatives of the new judges are invited in. (There seemed no obvious reason why they should have had to stand outside at all.) When the Attorney-General arrived and thrust his way in, robed counsel, silks and juniors, began to press through in the wake of his broad authoritative figure. But even as they began to stream in an agitated official rushed forward calling urgently to the attendant to shut the doors again, no doubt for sound administrative, but not very obvious, reasons. Lord Parker, with his scholarly good-humoured look, made a less awe-inspiring figure than his predecessor. After the oath had been administered to him by the Master of the Court Office, the Lord Chancellor praised Lord Goddard's work and welcomed his successor. The Attorney-General, in what to many must have been a moving little speech very quietly delivered, endorsed all that Lord Kilmuir had said about Lord Goddard and congratulated Lord Parker, who, he said, enjoyed the friendship of the Bar and was assured of all their support.

RICHARD ROE

OBITUARY

MR. F. GRIFFITHS

Mr. Frederick Griffiths, solicitor, of Kidsgrove, died on 7th September, aged 73. He was admitted in 1909.

MR. W. T. A. RAYNER

Mr. William Thomas Alfred Rayner, solicitor, of Moorgate, London, E.C.2, died on 6th October. He was admitted in 1913.

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RENT ACT PROBLEMS

Readers are cordially invited to submit their problems, whether on the Rent Act, 1957, or on other subjects, to the " Points in Practice " Department, " The Solicitors' Journal," Oyez House, Breams Buildings, Fetter Lane, London, E.C.4, but the following points should be noted :

1. Questions can only be accepted from registered subscribers who are practising solicitors.

2. Questions should be brief, typewritten *in duplicate*, and should be accompanied by the sender's name and address *on a separate sheet.*

3. If a postal reply is desired, a stamped addressed envelope should be enclosed.

Schedule I—Time for Application for Certificate of Disrepair—Rent pending Application

Q. I act on behalf of a building society who have appointed a receiver of certain property. The property is controlled under the Rent Acts and a notice to increase the rent was served upon the tenant in early September of 1957. On the 25th of that month the tenant served upon my clients Form G which referred to certain repairs in a very general way. Since that date my clients have taken no steps with regard to the repairs and the tenant himself has done nothing further. Am I correct in assuming that the tenant can approach the local authority at any time to obtain a certificate of disrepair, i.e., that there is no limit to the period in which this application may be made, and that pending a certificate of disrepair the tenant is obliged to pay the increased rent ?

A. We agree that the tenant is still entitled to apply for a certificate of disrepair (the application to be accompanied by a copy of the Form G notice served on 25th September), and that there is no abatement of the (increased) rent unless and until, the authority having notified the society of its intention (Rent Act, 1957, Sched. I, para. 5) (Form J) and three weeks having elapsed without offer and acceptance of a landlord's undertaking (Form K), a certificate is issued ; we would add that while, pending issue thereof, the tenant is obliged to pay the increased rent, there is provision for recovery of the increase paid during the period between the *application* for the certificate and the grant thereof (Sched. I, para. 7 (4)).

Schedule IV—Notice to Determine Expiring after 6th October, 1958, to be in Form S

Q. We are in correspondence with solicitors who maintain that any notice to quit a dwelling-house decontrolled under the 1957 Act which expires after 6th October, 1958, need not be in Form S and need not be for six months, but should be the normal notice to quit under the terms of the particular tenancy, provided not less than four weeks' notice is given. Will you please let us know whether they are correct, as we were under the impression that six months' notice under Form S was still necessary except in the case of a tenancy which could not end by notice to quit or otherwise before 6th October, 1958.

A. Our conclusion corresponds with your impression. The Rent Act, 1957, s. 11 (7), and Sched. IV, para. 2 (1), confers a right to retain possession on tenants of decontrolled dwelling-houses which were controlled immediately before 6th July, 1957 (the only " time of decontrol " so far), provided that their tenancies could be terminated or would terminate by 6th October, 1958 (Sched. IV, para. 2 (1)). And to terminate that right to retain possession, the landlord must—at *or after* the time of decontrol—serve a Form S notice requiring the tenant to give up possession on a date not earlier than fifteen months after the time of decontrol nor less than six months after the service of the notice (para. 2 (2)). Because the Act came into force on 6th July, 1957, 6th October, 1958, is the earliest possible date—but not the latest—for the expiry of the necessary Form S notice. We would add that the explanation for some of the apparently cumbersome phraseology is probably the fact that s. 11 (3) provides for further decontrol without further legislation.

1958 Act, s. 3—Non-acceptance of Proposal for Three-year Tenancy Made in September, 1957

Q. Mrs. *C* owns a certain property, the ground and first floors of which are let respectively to *A* and *B*. The rateable value of the dwelling-house is gross £92, net £72, and *A* and *B* agreed in writing that these figures should be apportioned equally between their two occupations. On the 26th August, 1957, notice to determine their right to retain possession was served upon *A* and *B* for 6th October, 1958, the rateable value being in each case £36. The notice in each case was accompanied by a letter saying that, without prejudice to the notice, Mrs. *C* was prepared to offer a tenancy of the rooms occupied subject to the terms of a formal lease for a period of three years from 16th September then next at the rent of £2 8s. 6d. per week. This rent was calculated approximately as follows :—

	£ s. d.
Rent (being twice the gross rateable value)	1 16 0
Proportion of rates	12 6
	£2 8 6

A and *B* were informed that if they desired to accept this offer it should be done immediately, so that a draft lease could be submitted for approval and the matter completed before the above-mentioned date, i.e., 16th September, 1957. Neither *A* nor *B* accepted the offer, and Mrs. *C* now wishes to bring proceedings to recover possession. Is the offer contained in the letter which accompanied the notice to determine sufficient for the purposes of s. 3 (1) (*a*) of the 1958 Act, or must Mrs. *C* again offer a tenancy for a term of not less than three years ? The query arises owing to a paragraph in Mr. Ashley Bramall's book on the 1958 Act (Current Law Guide No. 14) at p. 41, as follows :—

> " Of course, the three years' period cannot run from a date earlier than 6th October, 1958, or such later date as the occupier's former tenancy was brought to an end, since up to that date the occupier was still a tenant under the former tenancy."

If a landlord has been reasonable enough to offer a new tenancy immediately after the 1957 Act came into operation, must he be prejudiced by having to again offer a new tenancy to commence from 6th October ? If this is the case can a landlord ask a reasonable increase on the rent asked for over twelve months ago to compensate for the loss of income which has been sustained during that period ? If Mr. Bramall's contention is correct, then it would seem that tenants who unreasonably refused an offer of a new tenancy last year are gaining a benefit by their unreasonable refusal in comparison with those who agreed to an immediate increase in rent.

A. We share the view that Mr. Bramall's contention is not correct, though it may be arguable. It could be argued that the Landlord and Tenant (Temporary Provisions) Act, 1958, s. 3 (1), contemplates proceedings against one who is therein called an " occupier," not a tenant, so that para. (*a*) must be read as limited to proposals made to those who had acquired the new status (that of " occupier "), or who would not be

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affected by the acceptance of the proposal until they had acquired that status. In our opinion, this is too forced a construction, and there is a closer link between the provision of the paragraph and that of the Rent Act, 1957, Sched. IV, para. 4, than Mr. Bramall suggests. The idea is, in our view, that if the landlord has, since decontrol, made an offer which would bring that paragraph into operation *and* is a reasonable offer, the tenant who refuses it is not entitled to continue in occupation after this "right to retain possession" (Sched. IV, para. 2) has ceased; while the "not requiring the payment of increased rent in respect of any period before the proposal was made" merely illustrates the seizing of an opportunity to clear up a disputed point, that referred to in our "Current Topics" on 15th March last (*ante*, p. 184, "Decontrol: Antedating New Tenancy"). As there was no such requirement in the cases submitted, *A* and *B* would, in our opinion, have to justify their refusal if they are to satisfy the court on s. 3 (1) (*a*) of the 1958 Act.

Country Practice

UNFAIR TO SHEEPDOGS

Dear Mr. Highfield,

As a sheepdog, may I be allowed to enlighten some of your readers as to the legal position as it affects my profession? In a recent article of yours, giving a sheep's eye view of life, you used the adjective "nasty" in describing us sheepdogs. I think that some more sympathetic term might have been used, having regard to the difficulties, legal and otherwise, of a sheepdog's existence.

Take, for instance, the question of dog licences. Seven-and-sixpence a time is payable for all dogs except for puppies under six months old, blind people's guide dogs and sheepdogs. We sheepdogs, to qualify for exemption, have to be owned by a farmer or shepherd; and the number of licence-free dogs per farmer is limited by the number of sheep to be looked after. And the dog must be "kept and used solely for the purpose of tending sheep."

An ancestor of mine nearly got himself into trouble by chasing rabbits. It happened almost fifty years ago, at Stockley Pomeroy, when Mr. Aaron Floyde was cutting a field of corn. This ancestor of mine volunteered to catch rabbits as the last bit of corn in the centre of the field was being cut. Indeed, according to the police constable who was keeping watch, he caught nine rabbits in the space of half an hour. Jolly good show, I would have said; but not so the constable. Anyhow, the police said that a dog that was allowed to go and catch rabbits was not "kept and used solely for the purpose of tending sheep." When the case reached the Divisional Court—it is reported as *Egan* v. *Floyde* (1910), 74 J.P. 223—the prosecution even cited the 1810 case of *Dimmock* v. *Allenby* as authority for "the fact that the respondent did not prevent the dog from chasing rabbits was equivalent to using him for chasing rabbits." I am glad to say that the prosecution failed, but all the same it shows you how careful a sheepdog has to be in the way he spends his spare time.

A moot point arises when a sheepdog puppy attains the age of six months. Must he thereupon become subject to a dog licence until he is capable of tending sheep? The training is long and arduous. I myself was more than a year old before I really understood the first principles of sheep driving. At the risk of wearying your readers (most of whom surely have something better to do than sit down and read Country Practice) I should explain that a novice works with a clever, older dog. The relationship at times resembles an unwanted articled clerk tagged on to an overworked junior partner. My first few lessons were with old Ben, who had a short temper and sharp teeth. My master, the shepherd, directed us by whistle code, and soon I learnt to wheel left and right. Ben, to whom I was linked, corrected me if I mistook the signals.

Having mastered the signals, one develops a feeling for the job. Have you ever watched me nudge some sheep through a gateway? I sort of slither slowly along on my tum, and then if the sheep seem reluctant to move, I open my mouth and show them all my teeth.

The answer to the problem of the untrained sheepdog is to be found in *James* v. *Nicholas* (1886), 50 J.P. 292: the Case of the Crossbred Poodle. In that case, a farmer at Ynismudw, in the County of Glamorgan, owned a pet poodle who would accompany him on his walks round the farm. She could do tricks, the silly bitch, but when a police constable wished to see her rounding up the livestock, she was an abject failure. To add to her humiliation in front of a strange policeman, her master was summoned for failing to hold a current dog licence. Her master, however, had applied for and been given a certificate of exemption, but it was argued at great length that the exemption was in respect of a sheepdog, and that a crossbred poodle was not a sheepdog.

It was held that no offence had been committed. If there is a certificate of exemption in force, then the dog's ability to tend sheep is irrelevant. It might be open to the police to oppose the farmer's application for a certificate of exemption, on the grounds of bad faith or some other reason; but the Case of the Crossbred Poodle spared us dogs the anxieties of a sheep-driving test.

All this, I may say, is to ensure that seven-and-sixpence is not spent unnecessarily. By the time my master has filled in his form of application for an exemption certificate and has handed it in to the magistrates' clerk; and by the time a magistrate has granted the application; and by the time lists of exemptions have been sent to the Clerk to the County Council and the Customs and Excise people; and by the time the certificate of exemption reaches my master, well, that seven-and-sixpence has been well saved.

Yours respectfully,
A. COLLIE.
"HIGHFIELD."

The LIVERPOOL LAW CLERKS' SOCIETY announce the following syllabus of lectures to be delivered at the Law Library, Tower Building, Water Street, Liverpool, each Tuesday at 5.30 p.m.: 14th October to 16th December, 1958: A course of ten lectures on Conveyancing, by Mr. J. Turner, LL.M. 13th, 20th and 27th January, 1959: The Rent Acts, by Mr. Gerson Newman. 3rd, 10th and 17th February, 1959: Probate Practice, by Mr. G. Wentworth, LL.B.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Judicial Committee of the Privy Council

CRIMINAL LAW: CONVICTION AS ACCESSORY BEFORE THE FACT: NO PRINCIPAL

Surujpaul *v.* R.

Lord Tucker, Lord Somervell of Harrow, Lord Denning

2nd October, 1958

Appeal from the Court of Criminal Appeal of British Guiana.

The appellant, Surujpaul, was jointly charged and tried, together with four others, at the Criminal Assizes for the County of Berbice in British Guiana with the murder, on 9th March, 1957, of police constable C. Allen. The case for the prosecution was that they had jointly planned to rob the overseer of the Rose Hall Estate of the wages of the workers, and that Allen was shot while escorting the overseer in a Land Rover. The jury found the appellant guilty as an accessory before the fact and he was sentenced to death. His co-accused (other than one of them who was discharged) were found not guilty either as accessories or as principals. The Court of Criminal Appeal of British Guiana, on 8th January, 1958, affirmed the appellant's conviction. On his appeal to the Board *in forma pauperis* by special leave he contended that the jury's verdicts were contradictory and inconsistent—that there could be no accessory without a principal. The Crown contended, *inter alia*, that as against the appellant the jury might have found something in a statement which he had made to the police which would amount, together with evidence of an accomplice going to prove the existence of the plot, on which evidence the prosecution's case largely rested, to sufficient evidence and admissible against the appellant that the crime was committed by one or more of those who had been " counselled or procured " by him so to do.

LORD TUCKER, giving their lordships' reasons for having, on 24th July, allowed the appeal, said that it was essential to the conviction of the appellant as accessory before the fact for the Crown to prove that he had counselled, procured or commanded one or more of the other accused to commit the murder and that such person or persons had in fact done so. In finding that murder by any one of the accused had not been proved, but that none the less the appellant was guilty of having counselled one or more of them to commit murder, and that one or more of them, unspecified, in fact committed it, the jury had, at first sight at any rate, given an inconsistent and contradictory verdict. Although the appellant's statement might afford very strong corroboration of the accomplice's evidence with regard to the part taken by the appellant in the plot, and as to his counselling the others to commit robbery or murder, it was difficult to see how it could afford any evidence as to the actual commission of the crime at which, by their verdict, the jury had found he was not proved to have been present and assisting. A voluntary statement made by an accused person was admissible as a " confession " ; he could confess as to his own acts, knowledge or intentions, but he could not " confess " as to acts of other persons which he had not seen and of which he could only have knowledge by hearsay. A failure by the prosecution to prove an essential element in the offence could not be cured by an " admission " of that nature. There was here no distinction with regard to the evidence relating to the commission of the substantive offence as between the appellant and the other accused which could justify the result arrived at. [In the course of the judgment reference was made to *R.* v. *Hughes* (1860), Bell C.C. 242 ; 1 L.T. 450, and *R.* v. *Rowley* (1948), 32 Cr. App. R. 147, as being the only two cases which really threw much light on the present question.] Appeal allowed, verdict and sentence on the appellant quashed, and a verdict of not guilty entered.

APPEARANCES : *W. P. Grieve* (*Lawrence Jones & Co.*) ; *J. G. Le Quesne* (*Charles Russell & Co.*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[1 W.L.R. 1050**

Court of Appeal

LANDLORD AND TENANT: BUSINESS PREMISES: MOCK AUCTION ROOM CARRIED ON BY THIRD PARTY AS " MANAGER " UNDER FICTITIOUS AGREEMENT WITH TENANT

Teasdale *v.* Walker

Jenkins, Parker and Pearce, L.JJ. 30th July, 1958

Appeal from Skegness and Spilsby County Court.

Section 23 (1) of the Landlord and Tenant Act, 1954, provides that Pt. II of the Act (which provides for security of tenure for business tenants) " applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him . . . " On 10th May, 1955, the predecessor in title of the appellant landlord let certain shop premises to the respondent tenant for one year from 2nd March, 1955, together with a right to erect a rostrum " for the purpose of auctioning articles in connection with the business of the tenant," the tenant agreeing not to assign, underlet or part with possession. The premises were near the front of a seaside resort, and were used for " mock auctions," being open only at Easter, Whitsun, and from July to the end of September. During these periods in 1955 and 1956 the auctions were conducted by servants or agents of the tenant who received wages or commission, the tenant receiving the profits of the business. In April, 1957, the tenant made an agreement with one *G* to the effect that she would for one year " employ " *G* as " manager " at a " salary " computed on the basis that *G* should pay her £750, retain the whole of the business profits, conduct the business as he thought fit and without her interference during the usual periods, and discharge all expenses and outgoings including rent and rates ; he also received an option to renew the agreement for the year 1958. *G* conducted the business accordingly, and at the end of the season vacated the premises, which thereafter as usual remained closed. On 27th August, 1957, the landlord gave notice under s. 25 of the Landlord and Tenant Act, 1954, requiring the tenant to give up possession on 2nd March, 1958. The tenant made an application to the court on 17th December, 1957, pursuant to s. 24 (1) of the Act for a new tenancy, which the landlord opposed on the ground, *inter alia*, that the tenant was not in occupation of the premises for the purpose of a business carried on by her, as required by s. 23 (1). After a hearing on 2nd March, 1958, the county court judge granted a new lease. The landlord appealed.

PEARCE, L.J., reading the judgment of the court, said that the landlord contended that on the making of the agreement with *G* the premises were outside the Act, as the business carried on was *G's* business and not the tenant's, and that after *G* left at the end of the season of 1957 she had never effectively resumed occupation for the purposes of her business. It was argued for the tenant that the arrangement with *G* was only another variant of the arrangements she had made with others in previous years when she was undoubtedly in occupation for the purposes of her business ; she had a perfect right to enter the premises, so long as she did not interfere with *G* ; that she might be considered as occupying the premises for the purposes of the business of letting out the auction concession, and that on the date when the landlord's notice expired *G* had come and gone and she was again in full occupation. The judge below had held that the agreement was not a mere subterfuge designed for the purpose of preserving the tenant's rights under the Act. With that the court could not agree ; the agreement was a sham. To refer to *G* as the manager was a mere fiction ; the tenant had no control over *G*, was not interested in the profits, and was not responsible for the outgoings ; any theoretical residue of occupation which remained in her was not sufficient to give her the protection of the Act, and *Pegler* v. *Craven* [1952] 2 Q.B. 69 showed that when the business carried on on the premises was not the tenant's they were outside the Act. During the period of *G's* activities, therefore, the tenant lost her right to apply for a new tenancy, but if the premises came within the Act afterwards, she would have that right. If the tenant had been in business occupation during 1957, that

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occupation would have continued over the inactive season into 1958. The tenant had stated that if *G* did not exercise his option she would carry on by a servant or agent; but once the premises had ceased to be covered by the Act, it would need a clearer indication than that to bring them back within it. At no material time after *G* had left could the premises be shown to be within the Act, and the tenant's application was therefore ill-founded. Appeal allowed.

APPEARANCES: *Paul Curtis-Bennett* (*Kennedy, Genese & Syson*, for *Hodgkinson & Beevor*, Newark-on-Trent); *E. Ashley Bramall* (*Beach & Beach*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 1076**

CONSPIRACY: TRADE UNION: BAN ON MEMBERS PERFORMING AT DANCE HALL WHEN COLOUR BAR IN FORCE

Scala Ballroom (Wolverhampton), Ltd. *v.* Ratcliffe and Others

Hodson, Morris and Sellers, L.JJ. 30th July, 1958

Appeal from Diplock, J.

The plaintiffs, who were proprietors of a ballroom, excluded from the dance floor visitors of colour, although they were willing to employ coloured musicians in the orchestra. The Musicians' Union (of which the defendants were officials), which included among its members many coloured musicians of distinction and popularity, thereupon gave notice to the plaintiffs that its members would not be permitted to perform at the ballroom so long as the policy of racial discrimination continued. The plaintiffs claimed an injunction to restrain the union from persuading or attempting to persuade any of its members not to perform at the ballroom, alleging that the defendants had wrongfully combined and conspired to injure them in the way of their trade.

HODSON, L.J., said that the case called for consideration of the law of conspiracy which was considered by the House of Lords in *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* [1942] A.C. 435, where Viscount Simon, L.C., pointed out that in order to make out their case the plaintiffs had to establish (*a*) agreement between the defendants, (*b*) to effect an unlawful purpose, (*c*) resulting in damage to the plaintiffs. The judge had found (*a*) and (*c*) established, but the remaining element, (*b*) was one which always gave rise to difficulty. Lord Simon in *Crofter's* case said: "I am content to say that, unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful." Their lordships made it clear that there might be difficult cases for consideration where the interests which the defendants sought to protect were not business interests. This question of a colour bar had a very wide application, and it was submitted that there were no material interests for the defendants to protect here. Their own employment was not, it was submitted on the evidence, in peril, and what they were really seeking to do was to prevent the plaintiffs from carrying on their business in their own way by excluding from their ballroom people whom they wished to exclude. That was not really the effect of the evidence and his lordship was not prepared, at any rate for the purposes of this provisional opinion, to say that the interests which could lawfully be protected were confined to the material interests, in the sense of interests which could be exchanged for cash. Lawful interests might extend further than that; but, reading the affidavits, *prima facie*, at any rate, the defendants, who represented the members of the Musicians' Union, which included amongst its members a great many coloured people, had a lawful interest to protect in looking after their members' interests and, taking the long view, in looking after their livelihood as well. The plaintiffs had not made out a *prima facie* case on the merits entitling them to an injunction and the appeal should be dismissed.

MORRIS, L.J., delivered a concurring judgment.

SELLERS, L.J., agreed. Appeal dismissed.

APPEARANCES: *J. G. Le Quesne* (*Peacock & Goddard*, for *Michael J. Wade*, Wolverhampton); *Harry Lester* (*Hall, Brydon, Egerton & Nicholas*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[1 W.L.R. 1057**

Chancery Division

INCOME TAX: FOREIGN SECURITIES OR POSSESSIONS: CHEQUES DRAWN IN DOLLARS ON FOREIGN BANK PURCHASED BY ENGLISH BANKERS

Thomson (Inspector of Taxes) *v.* Moyse

Wynn Parry, J. 22nd July, 1958

Appeal from the Special Commissioners.

A taxpayer domiciled in the United States of America, but at all material times a British subject resident in the United Kingdom, was entitled to income from the estates of his mother and his father, both estates being situate in the United States. Payments of income from the estates were made by the trustees into an account in the taxpayer's name in the Bank of New York. The taxpayer carried out the following transactions: (*a*) he drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in this country, and requested them to purchase the cheques; (*b*) his English bankers, as authorised dealers under the Exchange Control Act, 1947, then sold the amount of dollars specified in the respective cheques to the Bank of England and credited to his account in England an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques; (*c*) his bankers then, by registered mail, presented his cheques to the Bank of New York, which honoured the cheques and, on the instructions of his English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States. The taxpayer was assessed to income tax under Cases IV and V of Schedule D of the Income Tax Act, 1918, in respect of these transactions. The question was whether the payments from his mother's estate during administration was income from "securities" in the United States within the meaning of Case IV, and whether the income from that estate after administration and that from his father's estate was income from "possessions" in that country within the meaning of Case V.

WYNN PARRY, J., said that the taxpayer's receipts were derived from contracts for the purchase of sterling made in England to be performed in England, and the English bankers in purchasing the dollars acted as principals and not as agents, and that the income did not therefore arise from securities in the United States under Case IV. On the reasoning of the passages in *Paget* v. *Inland Revenue Commissioners* [1938] 2 K.B. 25, to which he had referred and having regard to the view which he took of the transactions in this case, he concluded that none of the transactions in question fell under Case IV. So far as Case V was concerned, the transactions in the present case appeared to fall within *Carter* v. *Sharon* [1936] 1 All E.R. 720. In the case of income from foreign possessions, it had to be shown either that the taxpayer received it in this country or that he was entitled to it at the time it arrived in this country. Having referred to a passage in the speech of Lord Cave in *Foulsham* v. *Pickles* [1925] A.C. 458, his lordship adopted a *dictum* of Lord Cohen in *Inland Revenue Commissioners* v. *Gordon* [1952] 1 T.L.R. 913, and said that his decision really first and last turned on the analysis of the transactions and the effect of Cases IV and V; then whichever way the matter could be said to fall, no dollars representing income of the respondent were, over the material period, brought into the United Kingdom. Appeal dismissed.

APPEARANCES: *John Foster*, Q.C., and *Alan S. Orr* (*Solicitor, Inland Revenue*); *F. N. Bucher*, Q.C., and *P. J. Brennan* (*Vandercom, Stanton & Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 1063**

Queen's Bench Division

SMALL LOTTERY ON LICENSED PREMISES: WHETHER AN OFFENCE

Smith and Others *v.* Wyles

Lord Goddard, C.J., Donovan and Ashworth, JJ.

20th August, 1958

Case stated by Birmingham stipendiary magistrate.

The licensee of a public house was also the president of a bowling club, which had its headquarters at the public house.